U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 July 2007

CASE NO.: 2006-LDA-112

OWCP NO.: 02-140398

IN THE MATTER OF:

T. M.[1]

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.
For The Claimant

JOHN L. SCHOUEST, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits filed under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (herein the Act), brought by Claimant against Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on September 28, 2006, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 14 exhibits, Employer/Carrier proffered 18 exhibits at hearing and submitted additional exhibits identified as exhibits 19-35 post-hearing which were/are admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on December 4, 2006. On January 24, 2007, Counsel for the Regional Solicitor submitted a post-hearing brief. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship at the time of Claimant's alleged accident/injury.

2. That Employer/Carrier filed a Notice of Controversion on March 8, 2006.

3. That an informal conference before the District Director was held on May 4, 2006.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

4. That Claimant received temporary total disability benefits from February 24, 2005 through June 2, 2005 and from June 28, 2005 through October 3, 2005 at a compensation rate of $830.95 per week.

5. That some medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of accident/injury.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Entitlement to Section 7 medical benefits and reimbursement.

5. Claimant's average weekly wage.

6. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant testified at the formal hearing and was deposed by the parties on September 13, 2006. (EX-16). Claimant was 51 years old at the time of the hearing. He completed high school and one year of college before joining the U.S. Army for three years. (Tr. 20). After an honorable discharge for the service, he completed an 18-month automotive and diesel course and became a certified mechanic. (Tr. 21).

Claimant worked various jobs in the United States and overseas as a freelance mechanic operator, field engineer and fire fighter. (Tr. 21-26). He was hired by Employer to perform

maintenance work and arrived in Afghanistan on or about November 16, 2003. (Tr. 27). He described the work as "heavy" in that he had to lift HUMMV tires which weighed 200-250 pounds. (Tr. 28).

Claimant testified that before going to Afghanistan he "never really actually had back pain. I had muscle spasm that was treated by Flexeril." The muscle spasm was in the lower back and legs. He stated he had muscle spasm "when I had sleep apnea," which was corrected by surgical removal of his uvula. He never lost time from work because of his back spasm. (Tr. 29).

In deposition, Claimant testified he was never involved in any accident or fall nor had he ever hurt his lower back prior to working for Employer. (EX-16, p. 11). He also stated he had never experienced pain in his lower back before he went to work for Employer, only muscle spasm from cramping up due to lack of water in his system. (EX-16, pp. 11-12, 72).

When he first arrived in Afghanistan he was doing "quite well . . . working out at the gym." (Tr. 30). In July 2004, he was taking a HUMMV tire apart when he thought he twisted a muscle in his back. (Tr. 31). This was the first time he began to notice something wrong with his back. He stated he told his supervisor, that he hurt his back and it was bothering him. (EX-16, pp. 63-64). Later on, in October 2004, when he was checking generators and riding over rough terrain, his back started to feel bad, but he continued to work. (Tr. 31). He went to the medic who gave him Ibuprofen, "but there's no record of it." In November 2004, he hurt his toe (when he dropped a tire on it) and went to the Army doctor who told him he may have gout. Claimant had been told previously that he had gout in that same toe. (Tr. 32; EX-16, p. 65). He deposed that when he returned to the United States, his toe was x-rayed and it "showed it was broken or fractured," and "was not gout at all."[3] (EX-16, p. 65). However, he deposed his toe injury does not prevent him from being able to work, only running and exercising, but also affects his back. (EX-16, p. 66).

[3] In deposition, Claimant also testified that he had his foot x-rayed at Singapore General Hospital, Singapore, where he resides. (EX-16, pp. 103-105). The only evidence of services provided by Singapore General Hospital is embodied in billings which do not reveal any x-rays of the foot or toe. There are no interpretive reports of any services. (CX-14).

Between October 2004 and when Claimant departed Afghanistan on February 8, 2005, his back "got worse and worse." The main reason he left Afghanistan was to obtain a physical examination. He did not tell Employer that he was leaving because his back was hurting. Before he left Afghanistan he stated he could not walk ten yards because his back was extremely stiff and painful. (Tr. 33). He testified that when checking 96 generators in a 12-hour period, they drove fast, taking shortcuts and bumps. He did not miss one day of work, except for his toe condition. (Tr. 34).

Upon his return to the United States, he went to the VA Hospital in Canandaigua, New York. The main reason he went to the VA Hospital was because his back was hurting. (Tr. 34). A CAT scan was done. (Tr. 35). Later a MRI was performed on September 2, 2005, which he understood showed a herniated disc. (Tr. 37, 38). He began treating with Dr. Carlson and Dr. Ferrerro who prescribed physical therapy for his back. (Tr. 37-38). Dr. Ferrerro opined that he was at maximum medical improvement on March 8, 2006. (Tr. 38). She informed Claimant that he could not return to the same work he performed before and possibly may need a fusion in the future if he continued "getting back into the hard field." (Tr. 39).

Claimant underwent a functional capacity evaluation in February 2006. He has been working with his sister in a frame shop since mid-January 2006, assembling frames for pictures, which is light work. He is paid $7.00 per hour with free room and board and averages 20 hours of work per week. (Tr. 40-41; CX-9). Claimant testified that he did not think he could return to the work he was doing in Afghanistan because his back "pain is always there." (Tr. 41).

On cross-examination, Claimant confirmed that he held three different positions with Employer while in Afghanistan: as a general mechanic changing oil filters and doing general maintenance; a HUMMV mechanic; and as a generator mechanic. (Tr. 44-45). He affirmed that he disclosed to Employer on his application that he previously had back pain, "muscle spasms in my back," for which he took Flexeril. (Tr. 46; EX-16, p. 77). Claimant understood that the muscle spasm was caused by his sleep apnea. However, after his uvula operation, he stated he did not have any more muscle spasm. (Tr. 48).

Claimant testified that the back pain he developed while working for Employer in Afghanistan is not the same back pain he experienced before employment. (Tr. 49). He acknowledged that the only medical record in Employer's possession related to his foot/toe problem and not to his back condition. (Tr. 49-50). Claimant confirmed that he resigned his employment with Employer in February 2005 because his back pain was too great for him to do his job. (Tr. 51). On January 25, 2005, Claimant prepared a letter, "Subject: Exit Statement" in which the only mention of medical concerns related to his toe or foot problem because he could not walk, and not his back condition. (Tr. 51-53; EX-2, pp. 1-2). He did not inform Employer about having a back injury. (EX-16, pp. 81, 96).

Despite numerous sessions of physical therapy for his back, Claimant testified that his back pain is constant which he rates as a "10" on a scale of 1 to 10, 10 being the worst. (EX-16, pp. 87, 123). He confirmed that there was never any recommendation for surgery on his back. (EX-16, pp. 89-90, 116-117).

Claimant regards Dr. Ferrerro as his treating physician. (Tr. 57). He acknowledged that Dr. Ferrerro informed him on May 27, 2005, that he was doing very well and she wanted to have him work of some strengthening and return him to his job as a mechanic in the next month. (Tr. 57; EX-11, p. 13). Dr. Ferrerro also informed Claimant that the MRI findings would not restrict him from performing his job. (Tr. 59; EX-11, p. 5). Claimant was told by Dr. Ferrerro that he had degenerative arthritis. (Tr. 60).

Claimant testified that he is seeking a desk job in the oil field industry because he does not think he can go to the field and "pick up and twist and turn anymore." (Tr. 63).

The Medical Evidence

On October 23, 2003, Claimant completed a medical questionnaire in association with his application for employment. The questionnaire provides a checklist of musculoskeletal problems which the applicant may have had in the past, on which Claimant checked "back pain," but did not check "back injury." (EX-3, p. 1). His physical exam concluded that he lumbar spine was within normal limits. (EX-3, p. 5).

On October 10, 2004, Claimant sought treatment from Employer's clinic in Afghanistan for a diagnosed gout problem for which medication was prescribed and he was deemed "fit for duty." (EX-2, p. 3). On October 13, 2004, Claimant was again examined for increased complaints of gout in the right foot and acute gout attack. He was treated with medications. Claimant did not complain about any back pain or problems. (EX-3, p. 13).

On March 15, 2005, Dr. David Carlson examined Claimant who reported an injury sustained on February 10, 2005 riding in jeeps and armored vehicles that bounced around rugged terrain in Afghanistan. Claimant claimed he developed low back pain over a period of time which got progressively worse. On the date of exam, he reported pain radiating down the left leg. He was referred to Dr. Carlson by the VA Hospital for further evaluation. Dr. Carlson assessed Claimant with low back pain with left leg radiculopathy "in all likelihood related to a herniated L4-5 disc." Claimant was prescribed Relafen for pain. (CX-1, p. 5).

On March 30, 2005, Claimant presented to Dr. Donna Ferrerro with complaints of low back pain and left hip pain. He reported that he had never had the "same or similar condition." He did not relate his past medical history of back pain or back injury, only intermittent muscle spasm for ten years. He attributed his low back pain to an onset of October 2004 driving on rough terrain in Afghanistan. He stated he continued to work from November 2004 through February 2005 despite the pain. On physical exam, Dr. Ferrerro reported tenderness to palpation in bilateral lumbar paraspinals and muscle spasm elicited with side-bending bilaterally. Claimant's neurological exam was normal. Dr. Ferrerro recommended physical therapy and, if his symptoms did not improve, would consider further imaging with a lumbar MRI. (CX-1, pp. 7-9).

Claimant began physical therapy with Thompson Health on April 12, 2005. (CX-1, p. 11; EX-12). On April 13, 2005, Claimant related his lower back pain from lifting a HUMMV tire in July 2004 which persisted for a month. His pain returned in October 2004 from riding in vehicles on rough roads in Afghanistan. (CX-1, p. 11).

On April 26, 2005, Dr. Ferrerro opined that Claimant had lumbago with lumbar radiculitis and should continue physical therapy since he was making progress. She further stated that Claimant could not perform the essential duties of a mechanic,

which requires lifting of 20 to 40 pounds and bending, squatting, pushing and pulling and should remain on total temporary disability. (CX-1, pp. 22, 24).

On May 27, 2005, Dr. Ferrerro observed that Claimant has lumbar myofascial plan and no longer has radicular symptoms. She recommended continued physical therapy for strengthening his back and opined that he should remain on total temporary disability. (CX-1, p. 35). On June 28, 2005, Dr. Ferrerro completed a "Memo: To Whom It May Concern" indicating that she was requesting approval for a lumbar MRI to further evaluate Claimant. (CX-1, p. 37).

On July 11, 2005, Dr. Ferrerro opined that Claimant had mechanical low back pain with degenerative arthritis. A MRI was requested to further evaluate Claimant's ability to return to work full duty. She observed that Claimant was returning to work with partial restrictions of no lifting and bending until the MRI was reviewed. (CX-1, p. 39).

On September 2, 2005, Claimant underwent a MRI of the lumbar spine at University Medical Imaging which revealed degenerative disc changes at L3-4, L4-5 and L5-S1 with a small superimposed central posterior disc herniation/protrusion with an associated annular tear producing a minor impression on the thecal sac of doubtful significance. (CX-1, pp. 42-43).

On November 16, 2005, Dr. Ferrerro again examined Claimant in follow-up opining that Claimant was not able to perform the essential duties of his job due to pain and would benefit from physical therapy to strengthen his back from which he was previously discharged. She opined that the findings on MRI would not restrict Claimant from performing his job. Dr. Ferrerro further stated that Claimant "will hopefully be able to go back to work full duty without restrictions in early 2006." (CX-1, p. 45). Claimant returned to physical therapy from December 6, 2005 through December 30, 2005. (CX-1, pp. 48-58; EX-12).

On January 9, 2006, Dr. Ferrerro again examined Claimant in follow-up for chronic low back pain. She opined a FCE would be useful to determine Claimant's work limitations. (CX-1, p. 59). On February 15, 2006, Health Works Industrial Rehabilitation conducted a FCE in which it was concluded that Claimant gave full effort and was cooperative, with no symptom magnification observed resulting in valid test results. The therapist did not reach any conclusions regarding Claimant's physical capacity to

work, but provided "grid highlights [of Claimant's] maximum safe weights and frequencies of activity." (CX-1, p. 62). The "grid" reflects that Claimant could constantly lift/carry 20 pounds, frequently 30 pounds and occasionally 40 pounds; could sit constantly with good low back support; stand/walk and bend/reach frequently with position change as needed; and engage in elevated activity and climbing stairs constantly. (CX-1, p. 63).

On March 8, 2006, Dr. Ferrerro completed a Form OWCP-5c, Work Capacity Evaluation Musculoskeletal Conditions, in which it was concluded that Claimant was not capable of performing his usual job, and only able to work four hours at a time with uncertainty when he could increase his hours of work. In contrast to the results of the FCE, Dr. Ferrerro assigned the following restrictions: sitting for four hours in a workday, with two hours each of walking and standing; no reaching above shoulder, twisting, bending/stooping, squatting, kneeling or climbing; and limited driving. His restrictions were considered permanent, and maximum medical improvement had been reached as of March 8, 2006. (CX-1, p. 65).

Canandaigua VA Medical Center

On August 12, 1998, Claimant was admitted to the VA Hospital with a two year history of back pain. He awoke with increasing pain tracking down his left leg to his knee. A CT scan was done which showed a large L4-5 central disc. He was diagnosed with L4-5 herniated nucleus pulposus and discharged on August 19, 1998. (EX-19, p. 19). Claimant underwent physical therapy for his low back thereafter. (EX-19, pp. 86-94).

On August 4, 1999, Claimant reported to the VA Hospital with nasal congestion. His progress notes reflect his hospitalization in August 1998 for L4-5 herniation and a 1995 mud slide incident from which Claimant sustained a back injury. (EX-19, pp. 84-85).

On October 16, 2002, Claimant reported to the VA Hospital for the first time since 2000 with problems of sleep apnea and chronic low back pain with muscle spasm, among other problems. He had x-rays done of his lumbosacral spine which showed slight degenerative changes with moderate disc space narrowing at L4-5. (EX-19, pp. 16, 65-66).

On December 16, 2002, Claimant reported to the VA Hospital for follow-up for his sleep apnea in which the chart notes show he has a problem with chronic backache for which Flexeril was prescribed. (EX-19, pp. 61-62).

On April 3, 2003, Claimant reported to the VA Hospital with complaints of an infected painful broken off tooth. It was noted that his past medical problems included chronic back problems. (EX-19, p. 58). On June 19, 2003, Claimant sought atment for pain in his right great toe and history of gout. (EX-19, pp. 50-51). On August 11, 2003, Claimant again sought treatment for his great toe after a hammer fell down on the toe. (EX-19, p. 47).

On July 15, 2004, Claimant reported to the VA Hospital with chronic low back pain. He did not relate any injury to his back. He stated he had returned from Afghanistan ten days earlier where he had a lot of back pain and had not taken any medication for 10 days. (EX-19, p. 43). On physical exam, paraspinal spasm was noted, positive right-sided straight leg raising, but no neurologic deficits. (EX-19, p. 44). An x-ray of Claimant's lumbosacral spine was done which showed slight narrowing of the intervertebral space at L4-5. (CX-1, p. 3; EX-19, p. 11).

On February 8, 2005, Claimant again reported to the VA Hospital after returning from Afghanistan. He described his work as involving bending, lifting and very active physically. He reported complaints of chronic low back pain while working in Afghanistan which had become worse. On physical exam, he had "question paraspinal spasm positive," and positive straight leg raise bilaterally, but with no neurological deficit noted. (EX-19, pp. 41-42).

On February 11, 2005, it was noted that Claimant was referred with chronic low back pain for **six years "without trauma**." It was noted that Claimant had to leave his contract job in Afghanistan due to his back pain. He did not relate any injury or any other cause for the back pain. (EX-19, pp. 40-41). Claimant underwent a CT scan of the lumbosacral spine which disclosed degenerative disc disease at L4-5 and mild disc protrusion. (CX-1, p. 2; EX-19, p. 9).

On April 19, 2005, Claimant was seen by the neurology clinic on referral for his low back pain and paresthesias of the left leg. He reported recurrent pain and spasm **after heavy lifting in February 2005** that had persisted. Claimant had

moderate tightness of the lumbar muscles on exam. He was assessed with low back pain and probable left L5-S1 radiculopathy secondary to degenerative disc disease. Claimant also reported a new onset of low back pain after a very bumpy car ride in Afghanistan after which he had low back pain and left leg symptoms. Medication was prescribed. (EX-19, pp. 36-38).

On May 26, 2005, Claimant had an x-ray of his right great toe which was swollen and painful after eating clams the night before. The x-ray revealed degenerative osteoarthritic change of the first joint. There were no findings of a fracture. (EX-19, p. 7).

On January 11, 2006, Claimant returned to the VA Hospital with "subjective complaints of chronic low back pain" and seeking copies of his records and a prescription for Meloxicam which he could not continue to afford because he is unable to work due to his low back problems. (EX-19, pp. 34-35).

Dr. Martin Barrash

On September 27, 2006, Dr. Barrash, a board-certified neurosurgeon, examined Claimant at the request of Employer/Carrier. He testified at the formal hearing. (Tr. 71, 86; EX-18). Based on the physical exam, Dr. Barrash opined Claimant was neurologically normal and that his back was disproportionately tender to the amount of stimulation applied to the mid-line lower lumbar region. (Tr. 73). He considered Claimant's reaction to be exaggerated. He reviewed Claimant's September 2, 2005 MRI which he interpreted as showing degenerative arthritic changes with a subligamentous mid-line protrusion/herniation at L5-S1 which was very small and not touching the thecal sac or displacing any nerve roots. (Tr. 74, 77). The degenerative changes were caused by aging and "wear and tear." (Tr. 75). He opined the herniation/bulge had been present "for a long time . . . the process is going to take years and years to occur." (Tr. 78-79).

Dr. Barrash also reviewed the results of the FCE conducted on February 15, 2006. (Tr. 79). He opined Claimant was feeling better when he examined him in September 2006 and a new FCE was recommended. He opined further that the FCE results and his examination of Claimant did not correlate. (Tr. 80-81). He opined, based on his physical examination of Claimant, his

review of Claimant's medical records and his experience in treating individuals, Claimant could return to some form of employment. He opined Claimant could do light and possibly medium duty work. (Tr. 81).

Dr. Barrash also recommended back exercises for Claimant, a continuation of his present medication, Mobic, and suggested one or two epidural steroid injections for Claimant's radicular complaints. (Tr. 82-83). Regarding maximum medical improvement, Dr. Barrash testified that the recommended exercises and steroid injections could get Claimant better and that Claimant may not be at MMI. (Tr. 83).

Dr. Barrash testified that Claimant's belief that his back muscle spasm was related to his sleep apnea problem made no sense. Back spasm could not be correlated to sleep apnea. (Tr. 84).

On cross-examination, Dr. Barrash testified that hypothetically if Claimant was not symptomatic when he went to Afghanistan and was not symptomatic from November 2003 until he lifted a HUMMV tire in July 2004, and thereafter had symptomatology which he was not having before, it is possible that his pre-existing degenerative condition was aggravated. (Tr. 89).

On October 18, 2006, Dr. Barrash rendered a supplemental report after reviewing the VA records obtained post-hearing. He noted Claimant's original injury occurred in 1995 when he was involved in a mudslide and suffered a back injury. He observed that Claimant's back problems have been chronic since that injury with a hospitalization in 1998 and subsequent physical therapy. He opined that Claimant's complaints of injury reported to have occurred on February 3, 2005, "are nothing more than the same complaints that he has had for years." He further noted that, upon examination and history, Claimant had clearly denied any significant prior problems, "which is obviously not true," since Claimant's medical records reveal difficulties for ten years prior to 2005. (EX-33, p. 1). Dr. Barrash further opined that, in view of the VA records and Claimant's history, "there is no new injury, it is just a continuation of the same problems he has had for many, many years." He observed that the 1998 CAT scan is similar if not identical to the CAT scan of 2005. (EX-33, p. 2).

The Vocational Evidence

William Quintanilla, a vocational consultant, was retained by Employer/Carrier to perform a vocational assessment of Claimant. He prepared a vocational report dated September 20, 2006. (EX-15). He did not interview Claimant, but reviewed his medical records through March 8, 2006. He concluded Claimant's former job was medium in exertional demands. He considered the permanent restrictions assigned by Dr. Ferrerro with a residual functional capacity of sedentary to light part-time work. He conducted labor market surveys in Rochester, New York, near Claimant's residence at the time of the survey, and also in Houston, Texas.

Mr. Quintanilla identified three jobs in Rochester, New York as a non-commissioned security guard, front desk worker and a telemarketer paying in the range of $7.00 to $11.00 an hour. He located five jobs in Houston, Texas for gate/security guards, administrative assistant and customer service/sales paying in the range of $8.00 to $12.00. Thus, he concluded that Claimant had an entry-level wage earning capacity potential up to $12.00 an hour. (EX-15, pp. 5-7).

On October 18, 2006, Mr. Quintanilla rendered an updated labor market survey after interviewing Claimant post-hearing and considering Dr. Barrash's medical report and hearing testimony. (EX-34). He noted that Dr. Barrash opined that Claimant was capable of performing light to medium capacity work. Claimant informed Mr. Quintanilla of his part-time work with his sister's frame shop.

Mr. Quintanilla located five additional jobs in Houston, Texas consisting of a non-commissioned security guard job, parts order—taker/buyer, counter salesman, equipment salesman and inside salesman paying in the range of $8.50 to $26.44 an hour. He identified three additional jobs in Rochester, New York as an inbound customer service representative, inbound call center representative and store manager/trainee paying in the range of $10.00 to $17.79 an hour. (EX-34, pp. 3-5).

The Contentions of the Parties

Claimant contends he aggravated his pre-existing back condition while working for Employer in Afghanistan after lifting a HUMMV tire which thereafter progressively became worse while driving over rough terrain. His last date of exposure was

February 8, 2005, after which he sought medical treatment in the United States. He reached maximum medical improvement on March 8, 2006, but has sustained a loss of wage-earning capacity.

Employer/Carrier contend that Claimant made no claim for his alleged back injury while in Afghanistan. He sought medical care for his back after returning to the United States. He attributed his back condition to riding bumpy roads in Afghanistan and changing a tire on a HUMMV. Employer/Carrier contend that Claimant had no injury while employed by Employer and his complaints are related to a pre-existing degenerative back condition and the natural progression thereof.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are

accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. Claimant's Credibility

A claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that the alleged injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corp., 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have caused his alleged injury); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-215 (1976).

In the present case, Claimant's credibility is lacking. I was not impressed with Claimant's general demeanor nor his testimony which was riddled with inconsistencies and discrepancies. Despite injuring his back in a 1995 mudslide and a seven-day hospitalization for his back condition in 1998, Claimant blatantly denied any pre-existing back injury, prior accidents or falls or experiencing back pain before being employed by Employer. Although he indicated on his 2003 job application that he had back pain, he attributed the pain to back spasm from sleep apnea and denied that he had any "lower disc problem," despite the 1998 diagnosis of a L4-5 herniation. He failed to check he had suffered a "back injury," which was the box above "back pain." He also stated that he had no further muscle spasm after his uvula removal in 2000. Nevertheless, he inexplicably continued to take Flexeril for the muscle spasm through 2005.

The record does not support Claimant's allegations that he sought medical assistance for his alleged back problem while in Afghanistan. He did not miss any work as a result of his alleged back problem either after the HUMMV tire incident or the rides on rough terrain. Nevertheless, incredibly, he stated that before he left Afghanistan he could only walk ten yards because his back was stiff and painful. Although he sought treatment for his toe while in Afghanistan, the medical records are devoid of any complaints about his back. Claimant alleges his toe condition was not gout, but a fracture as evidenced by x-ray findings which were never produced for the record. He failed to inform Employer of his alleged back injury or problem when he prepared his "exit interview" memorandum. In short, I find his testimony regarding his alleged injuries to be incredible.

Furthermore, Claimant's testimony stretches credulity even farther by failing to mention his alleged HUMMV tire incident on July 15, 2004, when he sought back treatment and x-rays at the VA Hospital. Once Claimant returned to the United States and began active treatment for his back condition, he failed to inform his treating physician of his correct medical history in that Dr. Ferrerro noted no history of prior back pain or injury.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

This statutory presumption, however, does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a **prima facie** case. The U.S. Supreme Court has held that a **prima facie** claim for compensation, to which the

statutory presumption refers, "must at least allege an injury that arose in the course of employment as well as out of employment." U.S. Industries/Federal Sheet Metal v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (CRT)(1982), rev'g, Riley v. U.S. Industries/Federal Sheet Metal, 627 F.2d 455 (D.C. Cir. 1980). The Circuit Court noted that the fact that "something unexpectedly goes wrong with the human frame," quoting Wheatley v. Adler, 407 F.2d 307, 313 (CADC 1968), however, does not establish an "injury" within the meaning of the Act. Moreover, the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. Id. at 610.

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

However, the Section 20(a) presumption does not assist claimant in establishing the existence of a work-related accident or the existence of working conditions which could have caused the accident. Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981).

1. Claimant's Prima Facie Case

In the present matter, for purposes of analysis, I find that Claimant has established that he had a pre-existing back condition which was arguably aggravated while performing work for Employer in Afghanistan. He testified that he twisted a muscle in his back lifting a HUMMV tire in July 2004, but continued to work. In October 2004, he testified that his back became worse with riding over rough terrain while servicing generators for Employer.

Thus, if his testimony is credited which it was not, Claimant has arguably established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered an alleged harm or pain in July and October 2004, and

that his working conditions and activities on those dates could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

"Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer

is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

I find that Employer/Carrier have rebutted the Section 20(a) presumption with the opinions of Dr. Barrash. After reviewing the medical records from the VA Hospital, Dr. Barrash opined that Claimant's back problems have been chronic since 1995 and his symptoms which occurred through February 2005 were nothing more than the same complaints that he has had for years. He further opined that Claimant had not sustained a new injury while employed with Employer and that his CAT scan of 2005 was similar if not identical to the CAT scan of 1998, before he began working for Employer.

3. Conclusion or Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Notwithstanding the foregoing, I find and conclude that Claimant has failed to establish that he suffered a new back injury or that his back condition was aggravated by his working conditions with Employer. Claimant's claim is not assisted by his internally inconsistent testimony and contradictory statements. Moreover, I find the external medical evidence of record does not buttress Claimant's claim of a work-related injury as a result of his employment with Employer. The record is devoid of any medical opinion that Claimant's back condition was aggravated by his work with Employer.

From an objective standpoint, the medical records show that Claimant suffered from previous back pain as a result of a back injury in 1995. His medical history is extensive regarding the treatment he sought for his back at the VA Hospital. He was diagnosed with a L4-5 herniated nucleus pulposus in 1998 for

which he underwent physical therapy. His condition was diagnosed as degenerative changes with moderate disc space narrowing in 2002. He was noted to have chronic back pain and backache thereafter. He also received treatment at the VA Hospital for pain in his right great toe with a history of gout in June and August 2003.

When Claimant sought treatment at the VA Hospital in July 2004 and February 2005, he did not relate any injury to his back. His back complaints were the same as complaints made before his employment with Employer. It was further noted on February 11, 2005, that Claimant had chronic low back pain for six years "without trauma."

In March 2005, Dr. Carlson related Claimant's low back pain to his pre-existing herniated L4-5 disc. Dr. Ferrerro's opinion is flawed by Claimant's failure to inform her of his correct medical history. Although Claimant attributed his back pain to his October 2004 rough terrain rides, Dr. Ferrerro did not render an opinion regarding causation. She prescribed extensive physical therapy for Claimant in April 2005, May-June 2005, November and December 2005, for his "lumbago with lumbar radiculitis" and mechanical low back pain and degenerative arthritis. Dr. Ferrerro inconsistently concluded that Claimant could not perform his former job, but also opined that the September 2005 MRI findings would not restrict Claimant from performing his job.

Moreover, Dr. Ferrerro's inexplicable opinion regarding assigned permanent restrictions and Claimant's capacity to perform only part-time work is inconsistent with the FCE findings ordered and conducted at her request.

I find Dr. Barrash's opinion to be the more reasoned medical opinion of record. As a board-certified neurosurgeon, he concluded, after reviewing Claimant's extensive medical history and treatment at the VA Hospital and examining Claimant, that Claimant's presentation was exaggerated and his neurological exam was normal. He could not correlate his exam of Claimant with the results of the FCE and suggested a new FCE which was never conducted post-hearing because of Claimant's non-availability for various unexplained reasons. Although at hearing he conceded hypothetically that it was possible that Claimant's pre-existing degenerative back condition could have been aggravated by his working conditions, upon review of Claimant's VA records, he concluded that Claimant's complaints of injury with Employer "are nothing more than the same

complaints that he has had for years." He opined that Claimant did not sustain a new injury and his complaints are "just a continuation of the same problems he has had for many, many years." Objectively, he noted the CT scans of record from 1998 and 2005 were similar if not identical.

In light of the medical evidence of record, I find the medical records of the VA Hospital and Dr. Barrash as persuasive in establishing that Claimant suffered from pre-existing back pain prior to his employment with Employer. In fact, Claimant suffered from a chronic condition related to his lower back since 1995. I also find convincing the absence of any evidence that Claimant complained to Employer about his alleged back injury while in Afghanistan.

Due to the internal and external inconsistencies, discrepancies and contradictions noted in Claimant's testimony and medical evidence of record, I find and conclude that Claimant failed to establish by a preponderance of the evidence that he suffered a work-related accident and resulting injury to his back or toe or an aggravation thereof while employed by Employer in Afghanistan.

In view of the foregoing findings and conclusions, the remaining issues of nature and extent, maximum medical improvement, entitlement to Section 7 medical care, Section 8(f) relief and attorney's fees, penalties and interest are rendered moot.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

Claimant's claim for compensation and medical benefits is hereby **DENIED**.

ORDERED this 6th day of July, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge